IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, and KATALLA COMPANY, a corporation, *Plaintiffs in Error,* vs. DANIEL S. REEDER, *Defendant in Error.*	No. 2299.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA THIRD DIVISION.

REPLY BRIEF OF PLAINTIFFS IN ERROR

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT, and
LAWRENCE BOGLE,

Attorneys for Plaintiffs in Error.

610 Central Building,
Seattle, Washington.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a corporation, and KATALLA COMPANY, a corporation, *Plaintiffs in Error,* *vs.* DANIEL S. REEDER, *Defendant in Error.*	No. 2299.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA THIRD DIVISION.

REPLY BRIEF OF PLAINTIFFS IN ERROR

The matter in this reply brief will be directed solely to the motion to strike contained in the brief of the defendant in error and the argument in support of that motion, with the exception of a citation of a case referred to upon oral argument of this cause.

I.

On page 1 of his brief, defendant in error moves to strike the motions for non-suit and motions for directed verdict interposed by the plaintiffs in error in the course of the trial below, for the reason that these motions are not embodied in the bill of exceptions. It appears, however, in the bill of exceptions, (see pages 196 and 197 of printed record) that plaintiffs in error filed separate motions for non-suit, and exception was allowed to each of them. Also it appears in the bill of exceptions (see page 232 of printed record) that each of the plaintiffs in error filed a motion for directed verdict, which motions were overruled and exceptions allowed.

Each of the above referred to motions were in writing, and the record shows that they were filed at the time they were interposed. These motions are certified in the transcript. (Printed Record, pages 23 to 31 inclusive.) While the grounds of these motions are not recited in the bill of exceptions, yet, under the statute of Alaska, to be hereinafter noted, these motions being matters in writing and on file, are already a matter of record, and of course need not be carried into the bill of exceptions. This is particularly true when the bill of exceptions

itself discloses the making and overruling of the motions and recites the fact that such motions were filed in the cause. The Alaska statute referred to is as follows:

> "The statement of the exception, when settled and allowed, shall be signed by the Judge and filed with the Clerk and thereafter it shall be deemed and taken to be a part of the record of the cause; no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court."
>
> Sec. 1055, Chap. XXI, *Compiled Laws of the Territory of Alaska*, 1913.

II.

On page 2 of its brief, defendant in error moves to strike requested instructions of plaintiff and defendants below, and defendants' exceptions to the court's instructions to the jury, and defendants' motions for new trial. We shall omit any reference to the requested instructions, since all exceptions to the proceedings and judgment below are preserved by other portions of the record, and the contentions of plaintiffs in error here, contained on pages 15 to

18 inclusive of their brief, are reviewable without reference to any error in refusing the requested instructions.

(a) While the exceptions to the instructions given by the court (Printed Record, 273) were not carried into the bill of exceptions, yet they were in writing, filed in the court, and were presented to the court, allowed by the judge, and entered in the minutes of the court. It is true that the undeviating rule in the Federal courts is that the exception to the instructions must be taken at the time of trial, but such is not the rule in the Territory of Alaska. Chapter XVII of the Compiled Laws of Alaska provides for the conduct of the trial and the charge to the jury, but does not regulate the manner of taking exceptions. However, this point is covered by Section 1053 of the Compiled Laws of Alaska, 1913, which reads as follows:

> "Section 1053. The point of the exception shall be particularly stated and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth."

As we have seen, Section 1055 provides that when the exception shall have been signed by the

judge and filed with the clerk, it shall be taken to be a part of the record of the cause. In this particular instance the exceptions were presented and signed by the judge. (Printed Record, 277.)

(b) A motion for a new trial is made, by the statute of Alaska, a matter of writing, and in this case the motion was made in writing and filed, thereupon overruled, and exception allowed. (Printed Record, 281-283.) Of course it is contended by counsel for defendant in error that the action of the court in denying the motion for new trial is a question never considered in a Federal appellate court. That contention is correct in cases not reviewable from a territorial district court, where the subject of new trial is controlled and governed by the territorial statute. One of the grounds of new trial in the Territory of Alaska is, insufficiency of the evidence to justify the verdict or other decision, or that it is against law; and, error in law occurring at the trial and excepted to. (Sec. 1058 Compiled Laws, *supra.*)

In any event, the errors complained of and relied upon in this proceeding are raised without reference to the motion for new trial.

III.

Defendant in error moves the court to strike the bill of exceptions, styled by him "Transcript of Testimony," ending on page 244 and certified to at page 246 of the record, upon the ground that the certificate is a document filed separately. An inspection of the certified transcript shows that the certificate of the judge is attached to, annexed to, and made a part of the bill of exceptions, and refers to the foregoing bill of exceptions to which it is attached, and therefore does not in any manner, as a matter of fact and of record, come within the objection urged by defendant in error on page 3 of his brief.

In conclusion, upon the point of this motion, we urge now, as we urged in the oral argument, that every error presented here as constituting grounds for a reversal of the judgment below, was presented in some form or other to the trial court by sufficient exception, all of which exceptions were allowed and they have all been presented here upon sufficient assignments.

It would seem that courts of review are not now inclined, nor should they be so inclined, to spy

out technical reasons to avoid the passing upon questions that were fairly considered below and are explicitly brought on for review in the appellate court. If an appeal or writ of error has been fairly sued out and is fairly presented to the appellate court, that court will consider the questions presented and not split hairs in an attempt to divest itself of its appellate prerogative or jurisdiction, when such appellate jurisdiction is one of the guaranteed privileges of the litigant. The defendant in error in this case has but idly attempted to defend the judgment below, but has contented himself with seeking escape from the assignments of error by raising technical objections to the state of the record, whereas, the record itself, no matter how inartistically it may have been prepared or presented, shows that the very questions presented here were presented to the court below and fairly excepted to.

The attention of this court is respectfully called to the case of *Central Vermont Ry. Co. vs. Bethune,* Circuit Court of Appeals, First Circuit, 206 Fed. Rep., 868, decided since the filing of the original brief of plaintiffs in error, and which is here cited

in support of the positions assumed at pages 79 to 87 inclusive of said brief.

Respectfully submitted,

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT, and
LAWRENCE BOGLE,
Attorneys for Plaintiffs in Error.